STATE OF MICHIGAN

COURT OF APPEALS

DAVID YOUMANS,

Plaintiff-Appellant,

v

BWA PROPERTIES, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
July 26, 2011

No. 297275
Wayne Circuit Court
LC No. 09-018409-NI

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Plaintiff David Youmans sued his landlord, defendant BWA Properties, LLC, after a third party assaulted him while on the leased premises. Youmans appeals as of right the trial court's order granting BWA's motion for summary disposition and dismissing Youmans' claims under MCR 2.116(C)(8) and (10). Because we conclude there were no errors warranting relief, we affirm.

Youmans alleged that he was a tenant at the Clinton Rooming House, which is owned by BWA. According to Youmans, the rooming house had rules that prohibited weapons and restricted visitors. In August 2007, Mark Aird stabbed Youmans while on BWA's property. Youmans alleged that Aird, who was not a tenant, was "being harbored upon the premises by [BWA] or its agents or employees," who knew or should have known that Aird "could be violent (especially when he was drinking), had a criminal background, carried a weapon and was a hazard to tenants." Youmans' complaint included counts for negligence, breach of warranty, nuisance, trespass, violation of the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq*., and wrongful ejection. BWA moved for summary disposition under MCR 2.116(C)(8) and (10). The trial court determined that BWA could not be liable for Aird's criminal acts and granted BWA's motion. This appeal followed.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint by the pleadings alone. *Id.* at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (citation and internal quotations omitted). A motion under MCR 2.116(C)(10) tests the factual support for a claim. Summary disposition is appropriate under MCR 2.116(C)(10) when

"there is no genuine issue of material fact, and the moving party is entitled to judgment . . . as a matter of law." *Id.* at 120.

Youmans argues that the trial court erred in dismissing his negligence claim on the basis that BWA, his landlord, did not have a common-law duty to protect him from Aird. To establish a prima facie case of negligence, a plaintiff must show the defendant breached a duty owed to the plaintiff. *Lelito v Monroe*, 273 Mich App 416, 418-419; 729 NW2d 564 (2006). "Under the common law, 'as a general rule, there is no duty that obligates one person to aid or protect another.'" *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 25; 780 NW2d 272 (2010), quoting *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 499; 418 NW2d 381 (1988). Thus, a person normally has no duty to protect another from the criminal acts of third parties. There is, however, an exception to this general rule when a 'special relationship' exists between the plaintiff and the defendant. *Id*. at 25-26, quoting *William*, 429 Mich at 499. The landlord-tenant relationship is one of the recognized special relationships. *Dawe*, 485 Mich at 26 n 3.

In *Stanley v Town Square Coop*, 203 Mich App 143, 148; 512 NW2d 51 (1993), this Court clarified that the landlord's duty to protect tenants in common areas from the criminal acts of third parties is merely an expression of the landlord's duty as a possessor of land to protect its invitees from conditions on the land:

> A landlord has a duty to act because he possesses exclusive control over the common areas of the property. The duty is owed to tenants and their guests because they are the landlord's invitees. The duty to protect those persons from the criminal acts of third parties exists because criminal acts can be the foreseeable result of an unreasonably dangerous condition on the land. Landlords should anticipate that unsecured buildings provide opportunities for criminals to prey on victims away from the eyes and ears of police and witnesses, and the potential danger lurking in the interior of a building is not open and obvious to an unsuspecting invitee. Tenants and their guests rely upon responsible landlords to exercise reasonable care to protect them from foreseeable criminal activities in the common areas inside the premises, and when those in control fail to exercise reasonable care to provide for the safety of invitees, a dangerous condition is created on the premises that presents an unreasonable risk of harm. Thus, landlords have a duty to take reasonable precautions, such as installing locks on doors and providing adequate vestibule lighting, and may be liable in tort if they fail to do so. [*Id.* at 149-150.]

However, the landlord is not "an insurer of the safety of an invitee." *Id*. at 150. "The duty exists only when the landlord created a dangerous condition that enhances the likelihood of exposure to criminal assaults." *Id*.

In addition to the common law duty to maintain his or her premises in a condition that does not enhance the likelihood of exposure to criminal assaults, our Supreme Court has recognized that a landlord has a limited duty to respond to ongoing criminal acts: a premises possessor has a duty to "take reasonable measures in response to an ongoing situation that is taking place on the premises", which generally means expediting "the involvement of the police." *MacDonald v PKT, Inc*, 464 Mich 322, 337, 338; 628 NW2d 33 (2001). Whether a

premises possessor has a duty to protect an invitee turns on "whether a reasonable person would recognize a risk of imminent harm to an identifiable invitee", once a disturbance occurs on the premises. *Id*. at 339. The Court emphasized that "[i]t is only a present situation on the premises, not any past incidents, that creates a duty to respond." *Id*. at 335.

In this case, Youmans does not allege that the premises were unsafe except insofar that Aird was present. Aird's presence does not establish a dangerous condition on the land, much less a dangerous condition that BWA created or failed to repair. Further, Youmans did not allege that BWA negligently failed to respond to the ongoing attack. Therefore, the trial court did not err in concluding that BWA did not owe a duty to protect Youmans from Aird's criminal attack.

Youmans nevertheless argues that this case involves a "negligent undertaking" and relies on § 324A of the Restatement, 2d, Torts, which concerns the liability of "[o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things . . . ." Youmans refers to BWA's written rules and policies, which state: "The Clinton rooming house provides . . . safe . . . housing for residents", mentions the "protection and equality for each of its tenants," and prohibits weapons. However, this case does not involve an undertaking to render services that implicates the protection of a *third person*. Indeed, Youmans' argument more clearly implicates section 323 of the Restatement, 2d, Torts, which provides that one "who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking . . . ." See *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 401-402; 418 NW2d 478 (1988).

Here, however, Youmans has not shown that BWA undertook to provide him with security services. The rules referring to safe housing and for the protection of tenants do not, by themselves, constitute an undertaking to provide such services. In fact, the rules state that BWA is not responsible for altercations: "Each tenant is responsible for conducting themselves as an adult. Any disputes between tenants will not be handled by BWA Properties. City of Wayne Police will handle disputes according to the law." Like the rule restricting pets in *Braun v York Props, Inc*, 230 Mich App 138; 583 NW2d 503 (1998), a rule that prohibits weapons does not give rise to a duty to ensure that no one on the premises possesses a weapon. See *id*. at 148-149l; see also *Hoffner v Lanctoe*, ___ Mich App ___, slip op at 3; ___ NW2d ___ (Docket No. 292275) ("'A party may be under a legal duty when it voluntarily assumes a function that it is not legally required to perform,' and once 'a duty is voluntarily assumed, it must be performed with some degree of skill and care.'") (citation and internal quotation marks omitted).

Youmans also argues that BWA violated its duty under MCL 554.139 to keep common areas, such as the porch where he was attacked, fit for the use intended by the parties. Youmans contends that the premises were unfit because BWA "harbored there a known vicious, violent and dangerous person." "'Fit' is defined as 'adapted or suited; appropriate[.]'" *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 429; 751 NW2d 8 (2008) (citation omitted). However, Youmans does not cite any authority indicating that the presence of a person on the premises, by itself, renders the premises unfit. And he did not otherwise identify a condition on the property that made the property unfit for its intended use. Therefore, Youmans failed to establish a violation of the duty imposed under this statute.

Youmans similarly maintains that BWA owed him a duty under MCL 125.536(1), which provides a cause of action against landlords that permit "unsafe, unsanitary or unhealthful conditions to exist unabated in any portion of the dwelling . . . ." Youmans contends that the conditions on the property "were unsafe" as a result of "Mark Aird squatting there." We are not persuaded that Aird's mere presence may be equated with a condition of the premises. Youmans does not identify any actual condition of the premises that he contends was unsafe. Accordingly, we conclude that MCL 125.536 does not apply.

Relying on *McDowell v Detroit*, 264 Mich App 337; 690 NW2d 513 (2004), rev'd in part on other grounds, 477 Mich 1079 (2007), Youmans also argues that he has a viable claim of negligent nuisance, a subcategory of nuisance in fact. "'A negligent nuisance in fact is one that is created by the landowner's negligent acts, that is, a violation of some duty owed to the plaintiff which results in a nuisance.'" *Id.* at 349, quoting *Wagner v Regency Inn Corp*, 186 Mich App 158, 164; 463 NW2d 450 (1990). In *McDowell*, the plaintiff's decedents died in an apartment fire caused by a malfunction in the electrical supply system. This Court noted that the defendants' duties included compliance with the implied warranty of habitability, to maintain the premises in reasonable repair, and contractual duties to repair and maintain the unit and the electrical facilities. *McDowell*, 264 Mich App at 350. This Court determined that a question of fact existed concerning "whether 'by reason of circumstances and surroundings, [the defective condition in the electrical system had] the natural tendency . . . to create danger and inflict injury on person or property.'" *Id*. at 351, quoting *Wagner*, 186 Mich App at 164.

Here, Youmans contends that BWA "created and maintained a nuisance by allowing the 'defective condition' of Mark Aird to remain a hazard on the premises." Youmans compares BWA's harboring of Aird to the harboring of a vicious animal, but does not cite any authority suggesting that a person who frequently visits the premises may be treated as a "defective condition" or a vicious animal. Moreover, *McDowell* indicates that a negligent nuisance claim requires a plaintiff to establish a violation of "some duty owed to the householders." *Id*. at 349-350. Youmans has failed to show a duty necessary to establish negligent nuisance as described in *McDowell.*

Youmans also asserts that BWA violated "duties" under the MCPA. "The MCPA provides protection to Michigan's consumers by prohibiting various methods, acts, and practices in trade or commerce. MCL 445.903(1) provides a lengthy list of 'unfair, unconscionable, or deceptive' conduct for which remedies are available under the act." *Slobin v Henry Ford Health Care*, 469 Mich 211, 215; 666 NW2d 632 (2003). Youmans again relies on the rooming house rules to establish the violation. Specifically, he contends that he relied on BWA's representation that the premises were "safe" when he decided to rent a room at the Clinton rooming house, and that he could establish a violation of the MCPA if a jury were to find that the place was not safe.

In *Woodman v Kera, LLC*, 280 Mich App 125; 760 NW2d 641 (2008), this Court concluded that the defendant's representation that it provided a "safe" environment was not actionable under the MCPA. The lead opinion explained that "[t]he gravamen of plaintiff's claim is negligence because the allegations center on the way defendant operated the slide, not the manner by which it solicited or advertised its business." *Id*. at 156 (TALBOT, J.) Similarly, the gravamen of Youmans' allegations here with respect to safety is negligence in failing to

protect him from Aird, not the manner in which BWA solicited or advertised its business. Accordingly, the trial court did not err in dismissing his MCPA claim.

The trial court did not err when it granted summary disposition in favor of BWA.

Affirmed. As the prevailing party, BWA may tax its costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto